United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 691 - 4	DATE	2/19/2008
CASE TITLE	USA vs. Antoin Rezko		

DOCKET ENTRY TEXT

For the reasons stated in the attached minute order, the Court finds that the government's proffer has established by a preponderance of the evidence that a conspiracy existed, and that Defendant participated in that conspiracy. Regarding certain specific statements identified in the order below, the government has further established that they were made in furtherance of the conspiracy. The Court will address any other statements at trial to the extent Defendant objects to their admissibility.

■[For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Defendant Antoin Rezko seeks to prelude the admission of statements identified in the government's evidentiary proffer supporting the admissibility of co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). On December 21, 2007, the government submited its proffer pursuant to Federal Rule of Evidence 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . ."), and the Seventh Circuit's directives in *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1987). For the reasons stated below, the Court will admit certain statements pursuant to Rule 801(d)(2)(E). In addition, while the Court finds that the government has established by a preponderance of the evidence that a conspiracy existed and that Defendant participated in it, the Court will reserve ruling on the admissibility of specific statements in order to ensure that those statements satisfy Rule 801(d)(2)(E)'s requirement that they be made "in furtherance" of the conspiracy.

LEGAL STANDARD

Under Rule 801(d)(2)(E), a "statement" is not hearsay if it is "offered against a party" and is a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). "It is a condition for the admission of such statements [ ] that the Government provide sufficient evidence to convince the court, as a preliminary matter . . . that (1) a conspiracy existed, (2) the defendant and the declarant were members thereof, and (3) the proffered statement(s) were made during the course of and in furtherance of the conspiracy." *United States v. Cox*, 923 F.2d 519, 526 (7th Cir. 1991). This Rule applies even where, like here, the Indictment does not formally charge a conspiracy, *see United States v. Moon*, 512 F.3d 359, 363 (7th Cir. 2008); *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979), as long as the government establishes the existence of each element by a preponderance of the evidence. *See Santiago*, 582 F.2d at 1134, *overruled on other grounds by Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (holding that "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the

STATEMENT

hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible"); *United States v. Ladd*, 218 F.3d 701, 704 (7th Cir. 2000) ("For coconspirator statements to be admitted pursuant to Rule 801(d)(2)(E), the Government must prove by a preponderance of the evidence that a conspiracy existed, that both the declarant and the defendant were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy."); *United States v. Martinez de Ortiz*, 907 F.2d 629, 632 (7th Cir. 1990) (same).

Evidence as to the elements of Rule 801(d)(2)(E) "can be submitted to the court by way of proffer before trial, and the court can admit the statement(s) subject to its later determination that, based on all of the evidence admitted at trial, the Government has proved by a preponderance of that evidence all three requisite foundational elements." *Cox*, 923 F.2d at 526 (citing *Santiago*, 582 F.2d at 1131); *United States v. Haynie*, 179 F.3d 1048, 1050 (7th Cir. 1999) (the *Santiago* proffer "procedure allows the judge to conditionally admit coconspirator statements based on the government's proffer"). Although other procedures exist for preliminarily determining admissibility – *see United States v. Hunt*, 272 F.3d 488, 494 (7th Cir. 2001) ("several options available to the district court to determine the admissibility of *Santiago* evidence: (1) make a preliminary determination based on the government's proffer of evidence, (2) rule on each statement as elicited at trial based on the evidence presented at that point, (3) conditionally admit the evidence without a proffer subject to eventual supporting evidence to be presented sometime at trial (risking, of course, a possible mistrial), or (4) hold a full-blown pre-trial hearing to consider all the evidence and make a decision" (parentheses original)) – the Seventh Circuit has suggested that the "preferable procedure would be to at least require the government to preview the evidence which it believes brings the statements within the co-conspirator rule before delving into the evidence at trial." *See Cox*, 923 F.2d at 526 (quoting *United States v. Shoffner*, 826 F.2d 619, 630 (7th Cir. 1987)) (certain internal punctuation omitted); *see also United States v. Stephenson*, 53 F.3d 836, 842 (7th Cir. 1995) (the Seventh Circuit "has directed that district courts make a ruling on the admissibility of a co-conspirator's statements pursuant to Rule 104(a) before they are admitted at trial") (citing *Santiago*, 582 F.2d at 1130-35 and *Cox*, 923 F.2d at 526). And, contrary to Defendant's contention, the government's preview of evidence need not identify each specific statement sought to be admitted at trial under Rule 801(d)(2)(E). (*See* R. 258-1, Def.'s Resp. at 6 ("Noticeably absent from the government's lengthy proffer is any attempt to identify the specific co-schemer statements it intends to offer at trial . . .").) Indeed, the Seventh Circuit has flatly rejected that argument:

> The defendant claims that the Government is bound to give notice in advance of trial of co-conspirator statements it intends to introduce at trial . . . [T]he court has more than one method to use when considering the admissibility of co-conspirators statements. In fact, . . . this Court has gone so far as to discourage the practice of holding a pre-trial testimonial hearing as inefficient and potentially duplicative. Thus, we refuse to hold that the trial court committed error in admitting [] testimony without first having required the Government to include her statement in its pre-trial 801(d)(2)(E) proffer.

United States v. McClellan, 165 F.3d 535, 554 (7th Cir. 1999) (internal quotation and certain punctuation omitted). "*Santiago* proffers are, by nature and necessity, argumentative and summary." *Cox*, 923 F.2d at 527.

I. "Existence of" and "Participation in" a Conspiracy

To establish a conspiracy for purposes of Rule 801(d)(2)(E), "the government must show the existence of an agreement between two or more persons for the purpose of committing, by their joint efforts, a criminal act." *Hunt*, 272 F.3d at 495, *superseded by statute on other grounds as stated in United States v. Rodriguez-Cardenas*, 362 F.3d 958 (7th Cir. 2004). In addition, "[t]here must be a 'participatory link' between the conspiracy and the defendant, which requires the government to show that the defendant knew of

STATEMENT

the conspiracy and intended to join its criminal purpose." *Id.* (citing *United States v. Pagan*, 196 F.3d 884, 889 (7th Cir. 1999) and *United States v. Navarez*, 954 F.2d 1375, 1380-81 (7th Cir. 1992)); *cf. Shoffner*, 826 F.2d at 627 ("Of course, once the conspiracy is established, only slight evidence is required to link a defendant to it."). In determining the existence of a scheme, and a defendant's participation in it, a court may consider the content of the hearsay statement itself. *Bourjaily*, 483 U.S. at 180-81, 107 S. Ct. at 2781.

II. "In Furtherance" of the Conspiracy

In order to be in furtherance of the conspiracy, statements need not have been exclusively, or even primarily, made to further the conspiracy." *Shoffner*, 826 F.2d at 628. Rather, "[t]he standard to be applied is whether some reasonable basis exists for concluding that the statement furthered the conspiracy." *Id.* (internal quotation). Applying this standard, the Seventh Circuit has upheld the admission of a significant range of statements made "in furtherance" of a conspiracy, including the following: (1) updates on a conspiracy's progress, *United States v. Potts*, 840 F.2d 368, 371; (2) statements regarding planning or reviewing co-conspirators' exploits, *United States v. Molt*, 772 F.2d 366, 368-69 (7th Cir. 1985); (3) assurances that a member of the conspiracy can be trusted to perform his role, *United States v. Buishas*, 791 F.2d 1310, 1315 (7th Cir. 1986); (4) statements that are "part of the information flow between conspirators intended to help each perform his role," *United States v. Van Daal Wyk*, 840 F.2d 494, 499 (7th Cir. 1988); (5) statements intended to recruit potential members of the conspiracy, *United States v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997); (6) statements intended to reassure the listener regarding the progress or stability of the conspiracy, *United States v. Sophie*, 900 F.2d 1064, 1073 (7th Cir. 1990); and (7) statements designed to conceal a conspiracy where ongoing concealment is one of its purposes, *United States v. Mackey*, 571 F.2d 376, 383 (7th Cir. 1978).

ANALYSIS

I. Defendant's Participation in the Conspiracy

The government proffers the existence of a single scheme to defraud the beneficiaries of the Teacher's Retirement System ("TRS") and the people of the State of Illinois of the honest services of Stuart Levine as a board member of TRS and the Illinois Health Facilities Board. Levine owed a duty of honest services by virtue of being a member of (1) the TRS Board of Trustees (which reviewed proposals by private investment management companies to manage funds on behalf of the TRS public pension plan) and (2) the Illinois Health Facilities Planning Board (which reviewed bids to build new hospitals). (R. 247-1, Gov't Proffer at 1-3.) Defendant allegedly used Levine's position on the TRS Board and the Illinois Health Facilities Planning Board to obtain financial benefits for himself and his associates. (*Id.* at 2.)

The government's proffer establishes that a conspiracy existed and that Rezko joined in that conspiracy. Of particular note, the proffer identifies two conversations between Levine and Rezko wherein Levine and Rezko "agreed that if Levine helped Rezko at TRS, Rezko would share the profits with Levine." (*Id*. at 22.) In the first conversation, which occurred in the summer of 2003, "Levine told Rezko that TRS had hundreds of millions of dollars available in private equity and real estate that TRS would need to invest." (*Id*.) Levine will further testify that "Rezko and Levine then agreed that if Levine helped Rezko at TRS, Rezko would share profits with Levine." (*Id*.) "Levine and Rezko also agreed that there would be times that Rezko or Public Official A needed to repay political contributors by helping those people get investments from TRS, and that Levine would not necessarily receive any money on those deals." (*Id*.)

In the second conversation, which occurred at the Standard Club on April 14, 2004, Levine told Rezko about all the "potential finder's fees" that Levine "expected" to share with Rezko – Rezko previously was unaware of certain fees that Levine had arranged. (*Id.*) Levine will testify that he prepared a chart with the names of funds (including Investment Firms 2, 3, 4, 6, 7, and 10) and how much money Rezko, Levine,

STATEMENT

and the finder would get from the investment fund. (*Id.*) Levine and Rezko agreed that they would share evenly the finder's fees from the scheme. (*Id.*)

Because Rezko's statements to Levine are party admissions, these conversations are admissible apart from Rule 801(d)(2)(E), as Defendant concedes. (R. 258-1, Def.'s Resp. at 29 (stating further that Defendant "vehemently denies the truth of Levine's assertions").) Based on the anticipated testimony of Levine and the statements he will attribute to Rezko (as well as the other proffered evidence), the government has set forth sufficient evidence to establish by a preponderance of the evidence (1) that there was an "agreement between two or more persons for the purpose of committing, by their joint efforts, a criminal act," and (2) that there was a "'participatory link' between the conspiracy and the defendant." *Hunt*, 272 F.3d at 495.

II. Particular Categories of Co-Schemer Statements

In its proffer, the government identifies the following individuals as co-schemers: Levine, Steven Loren, Joseph Cari, Jacob Kiferbaum, P. Nicholas Hurtgen, and Co-Schemers A, B, C, E, F, and I. As a general matter, these individuals' statements are admissible pursuant to Rule 801(d)(2)(E) if the government establishes (1) that each individual was a co-schemer at the time he made the statement, and (2) that the statement was in furtherance of the conspiracy. In support of admissibility, the government asserts that Loren, Cari, and Kiferbaum "will testify that they engaged in criminal wrongdoing with Levine, which included participating in plans to extract bribes from investment firms and hospitals in exchange for Levine's official actions." (R. 314-1, Gov't's Reply at 4.) The government further asserts that Co-Schemer C will admit that, at the direction of Levine and Rezko, he shared finder's fees with people who performed no work, and Co-Schemer F will admit that he expected to receive a finder's fee for doing no work and that he would split that fee with Rezko and Levine. (*Id*. at 4-5 (further asserting that "there are contemporaneous recordings made of the cooperating witnesses which corroborate many of the key aspects of their expected testimony"); *cf.* R. 258-1, Def.'s Resp. at 8 (asserting that "Co-Schemers C and F, whom the government says it intends to call at trial, do not admit to being co-schemers, do not admit to doing anything illegal, and have limited knowledge about only one or two of the many transactions at issue").) The government does not intend to call Co-Schemers A, B, E, or I at trial. (*See* R. 258-1, Def.'s Resp. at 8 ("Although the government claims Hurtgen is a co-schemer, it will not call Hurtgen at trial, has never interviewed him about the charged scheme, and he has consistently maintained his innocence. The government will not call purported Co-Schemers A, B, E, or I at trial and has never interviewed Co-Schemers A or B . . . .").).

The main thrust of Defendant's objection to the proffer is that for several detailed and fact-specific reasons the government has not demonstrated by a preponderance of the evidence that the alleged conspiracy actually existed. In general, Defendant does not dispute that the proffered statements were made, but rather contends that they are susceptible to more than one interpretation, or that external facts can explain away whatever inculpation exists. (*See, e.g., id.* at 7-8 ("The scheme alleged in this case is the figment of the imagination of one witness – Stuart Levine . . . . only Levine will testify that the alleged scheme existed."), ("Even the individuals who have pled guilty in this and related cases – Loren, Cari, and Kiferbaum – do not admit that they participated in the charged scheme and corroborate only certain limited aspects of Levine's story"), ("[t]here is, to say the least, significant cause to doubt the credibility of Levine's testimony").) All told, Defendant has presented viable arguments for trial, but at this point those arguments are unavailing. The government's *Santiago* proffer establishes by a preponderance of the evidence that there existed, and Defendant participated in, a conspiracy to deprive TRS beneficiaries and the people of the State of Illinois of Stuart Levine's honest services. The Court will address the admissibility of many of the individual statements in the context of the trial. Where appropriate at this stage, however, the Court will address some specific issues and give some categorical guidance. The Court will address the particular categories of co-conspirator statements in turn.

STATEMENT

A. Levine's Control Over the TRS Board

In its proffer, the government asserts that by the summer of 2001, "Levine, working in concert with Co-Schemer A, who had a significant interest in a real estate asset management firm that had a long-standing business relationship with TRS, had established effective control over the TRS board by forming and maintaining a group of TRS trustees that consistently voted together on matters important to Co-Schemer A and Levine." (R. 247-1, Gov't Proffer at 18; *see also* R. 258-1, Def.'s Resp. at 13 (asserting that Levine attended his first TRS Board meeting on October 30, 2000).) Defendant takes issue with this characterization, asserting for a number of reasons that "the evidence contradicts Levine's delusions of controlling the TRS board" and that, as a result, the government has not established by a preponderance that the alleged conspiracy existed. (R. 258-1, Def.'s Resp. at 11-27.) The parties address this issue at length in their papers, presenting drastically different versions of the weight of Levine's actual authority on the TRS Board.

When Levine joined the TRS Board in late 2000, the Board consisted of ten trustees, including the Superintendent of Education, four appointees of the governor, four trustees elected by contributing TRS members, and one trustee elected by TRS annuitants. Legislation enacted in 2001 added a new annuitant trustee position to the TRS Board. For reasons the Court need not detail here, the TRS Board maintained the authority to fill the vacant position, and, in part because of a legal determination by Loren (then outside counsel for TRS), Levine and his voting bloc installed (or merely wound up with, if Defendant's version is credited) like-minded board members. (*See* R. 258-1, Def.'s Resp. at 14; R. 314-1, Gov't Reply at 9.) Indeed, TRS records reflect that Levine's voting bloc did not lose a vote after August 2001. (R. 314-1, Gov't Reply at 10.)

According to the government's proffer, in early 2003, "a threat arose towards Levine's and Co-Schemer A's control over the TRS Board" – a proposed consolidation of three of the main Illinois state pension boards. (R. 247-1, Gov't Proffer at 18-19).) The government submits that Levine and Co-Schemer A opposed consolidating the pension boards because it might cause them to lost their control at TRS. To that end, they proposed a so-called "accommodation" to Rezko and Co-Schemer B:

> In the spring of 2003, Co-Schemer A told Levine that Co-Schemer A would talk to Rezko and Co-Schemer B about trying to stop the pension consolidation plan . . . . Co-Schemer A later told Levine that he had spoken with Rezko and Co-Schemer B, and offered an accommodation to them. In exchange for their help in stopping the consolidation proposal, Co-Schemer A said that Co-Schemer A and Levine would use their influence on the TRS Board to help investment funds that Rezko or Co-Schemer B recommended receive investments from TRS. Co-Schemer A said that Rezko and Co-Schemer B agreed to the arrangement. Levine understood from Co-Schemer A's description that Rezko and Co-Schemer B would ask Levine and Co-Schemer A to help investment firms receive TRS money because those investment firms had and would make political contributions to Public Official A.

(*Id.* at 19.) Defendant objects to the admissibility of Co-Schemer A's statements, asserting that "but for the government's labeling of him as 'Co-Schemer A,' there is no indication whatsoever that Co-Schemer A engaged in the alleged scheme." (R. 258-1, Def.'s Resp. at 12 ("[n]owhere in the 174 pages of interview memos, 942 pages of agent notes, 325 pages of grand jury testimony, or 1,669 Title III recordings does Levine claim that Co-Schemer A was aware that Levine or Rezko stood to receive any kickback, improper finder's fee, or illegal gain from any of the transactions at issue . . . .").) Defendant further asserts that "[t]he Court should scrutinize the proffered hearsay statements of Co-Schemer A particularly carefully because Levine is the only source of Co-Schemer A's purported statements . . . ." (*Id.* at 12-13.)

STATEMENT

The Court overrules Defendant's objection. The government has submitted enough corroborating evidence to carry its burden that the so-called "accommodation" was in furtherance of the conspiracy. In addition to Levine's testimony, the government has presented summaries of recorded phone calls and Individual J's testimony that corroborate the government's contention that Co-Schemer A was "an integral player" in the scheme. Even though some of the corroborating evidence post-dates the supposed "accommodation," it nonetheless informs the inferences that can be drawn from the prior statement. *See, e.g., Shoffner*, 826 F.2d at 628; *see also United States v. Marin*, 7 F.3d 679, 690 (7th Cir. 1993) ("A court may conclude that statements are in furtherance of a conspiracy even though the statements are susceptible of alternative interpretations."). The Court finds that the government has met its burden under Rule 801(d)(2)(E) as to Co-Schemer A's statements regarding the "accommodation."

B. Statements of Alleged Co-Schemers Related to the Alleged Sharing of Finder's Fees

Although Defendant does not object under Rule 801(d)(2)(E) to Levine's testimony about what Rezko purportedly said at their April 14 Standard Club meeting, Defendant does object to the admission of Levine's subsequent (recorded) conversations with Co-Schemer E about that meeting and the alleged sharing of finder's fees. Defendant argues that a combination of factors demonstrate that the government has not met its burden with regard to these conversations: (1) that "as Co-Schemer E stated, Levine 'brags about bullshit' and everything he says should be taken 'with a grain of salt;'" (2) that Co-Schemer E "does not pay much attention while Levine is on the telephone – a fact which is borne out by the numerous 'Mm-hm's' reflected in the transcripts;" (3) that Co-Schemer E voluntarily agreed to meet with the FBI, explained the transactions at issue, and offered to fully cooperate with the government's investigation; (4) that interview memoranda related to Co-Schemer E's six interviews "impeach[] Levine's story"; (5) that the government has not charged Co-Schemer E and will not call him at trial; (6) that Co-Schemer E told Levine that he would not do anything illegal; and (7) that Co-Schemer E "would run any consulting agreement through an attorney before agreeing to it." (R. 258-1, Def.'s Resp. at 32.) The ultimate merits of these arguments will play out at trial, but at this juncture Defendant's argument is unpersuasive. Without reproducing those excerpts here, it suffices to say, as Defendant concedes, that "these calls appear clearly to implicate Co-Schemer E in the scheme to share fees that Levine was to receive from TRS and Planning Board transactions." (R. 258-1, Def.'s Resp. at 30.) The statements specifically identified in the government's proffer are therefore admissible under Rule 801(d)(2)(E).

C. Investment Firm 1

According to the government's proffer, the first time Levine misused his position at TRS was in connection with a $50 million placement of TRS funds with Investment Firm 1 in August 2003. (R. 247-1, Gov't Proffer at 32.) The government asserts that Co-Schemer C received a $375,000 finder's fee from that transaction, a portion of which Levine and Rezko directed that he give to Individual D, who in turn used that money to Rezko's benefit. (*Id.*) As noted above, the government asserts that, in early 2003, Levine and Co-Schemer A discussed the idea of steering a finder's fee to Individual T, an individual who had pressured Rezko to allow Individual T to make money from the state administration. (*Id.*)

Levine approached Co-Schemer C and asked whether Co-Schemer C would be willing to split any finder's fee that Co-Schemer C would earn from Investment Firm 1 for arranging an investment with TRS. (*Id.* at 33.) Co-Schemer C agreed to do on the understanding that Levine would ensure that the investment firm would receive the investment. (*Id.*) Levine further told Co-Schemer C that he would share that fee with Individual T. (*Id.*) The arrangement with Individual T later fell through, but Rezko told Levine that Levine should proceed with the deal "because someone else could be chosen to split the finder's fee with Co-Schemer C." (*Id.*) The deal went through as planned and Investment Firm 1 received the investment, yet Levine failed to disclose to the TRS Board how Co-Schemer C planned to share his finder's fee. (*Id.* at 34.)

STATEMENT

Months later, Rezko supplied Levine with the name of Individual D as the person who would share Co-Schemer C's fee. (*Id.*) Co-Schemer C later directed a portion of his finder's fee to Individual D, and, to conceal the nature of the transaction, Levine arranged for Loren to draw up a sham contract to make it appear as if Co-Schemer C and Individual D had a legitimate business relationship. (*Id.*) According to the government, Individual D later used part of the funds received "to make payments on Rezko's behalf." (*Id.* at 36.)

The government seeks to introduce the statements of Co-Schemer C pursuant to Rule 801(d)(2)(E). (*Id*. at 32-37.) In response, Defendant argues that "the more credible evidence shows that Co-Schemer C is not a co-schemer and, therefore, that his statements should not be admitted pursuant to Fed. R. Evid. 801(d)(2)(E)." (R. 258-1, Def.'s Resp. at 33.) Defendant submits that this is the case because (1) Co-Schemer C, a founder of Investment Firm 1, expected to receive a finder's fee in accordance with industry custom, (2) Investment Firm 1 made a proposal to TRS and that proposal went through the normal due diligence process, during which Co-Schemer C's finder's fee was disclosed, (3) Co-Schemer C suggested that Investment Firm 1 hire Individual T as a consultant (which an independent lawyer approved although the parties never executed a consulting agreement), and (4) that, while Co-Schemer C "was aware that Individual D would not perform the services reflected in the agreement, he entered into the agreement based on the assurances of five lawyers . . . that it was legal to do so." (*Id.* at 33-35.)

Weighing the parties' submissions, the Court finds that the government has met its burden regarding Co-Schemer C's statements related to Investment Firm 1. First, the government proffered in reply that Co-Schemer C did suggest that Investment Firm 1 hire Individual T as a consultant, but nonetheless knew that "he did not expect this to be a legitimate business arrangement and did not expect that Individual T would actually do any work in exchange for the money." (R. 314-1, Gov't Reply at 19.) Second, as Defendant concedes, Co-Schemer C knew that Individual D also did not intend to perform consulting services despite receiving a fee to do so. Thus, notwithstanding the fact that certain lawyers (including admitted co-schemer Loren) advised that sharing the finder's fee at Levine's direction via consulting agreements was legal, the agreements nonetheless were admitted sham contracts. Moreover, the government submits that the legal advice received was based on Co-Schemer C's material omissions. (R. 314-1, Gov't Reply at 20 n.12.)

D. Investment Firms 2 and 3

The government proffers that Levine and Rezko also tried to help two other investment companies, Investment Firms 2 and 3, receive a TRS investment so that Levine and Rezko would benefit from the finder's fees that Co-Schemer C would receive from those two companies. (R. 247-1, Gov't Proffer at 38.) Although neither firm actually received investments – their applications were pending when the FBI first contacted Levine on May 20, 2004 and as a result he did not further assist either firm – Co-Schemer C agreed to share his finder's fee as directed by Levine and Rezko. (*Id*.) To this end, Levine "arranged access for Investment Firm 2 and Investment Firm 3 representatives with TRS and put pressure on TRS staff to approve investments in those firms" without disclosing his interest in those investments. (*Id*. at 39.) The government proffers the summary of a phone call where Levine and Co-Schemer C agreed to direct a share of Co-Schemer C's finder's fee to Co-Schemer E. (*Id.* at 40 (indicating further that Co-Schemer C later confirmed this arrangement with Co-Schemer E).) Levine and Rezko discussed this arrangement during their April 14 meeting at the Standard Club. (*Id*.)

Defendant objects to the admission of these co-schemer statements because (1) "[t]here is no evidence that Rezko ever talked to Co-Schemer C, let alone that he directed Co-Schemer C to do anything with his finder's fees," (2) because "both Co-Schemer C and Co-Schemer E refute the government's version of events," and (3) "[n]otwithstanding his guilty plea, Loren corroborates the stories of both Co-Schemer C and Co-Schemer E." (R. 258-1, Def.'s Resp. at 37-38.)

STATEMENT

The first argument is a non-starter. Based on the proffer, the government has established for the purposes of *Santiago* that Rezko was a participant in the conspiracy – indeed Levine will testify that Rezko discussed the arrangements of Investment Firms 2 and 3 at the Standard Club meeting – and as a result any statements made by co-conspirators are attributable to Rezko regardless of whether they were made to him directly. *See United States v. Cerro*, 775 F.2d 908, 910 (7th Cir. 1985) ("statements made by a conspirator are admissible against all conspirators"); *United States v. Ziperstein*, 601, F.2d 281, 294 (7th Cir. 1979); *see also United States v. Balistieri*, 779 F.2d 1191, 1225 (7th cir. 1985); *United States v. Coe*, 718 F.2d 830, 839 (7th Cir. 1983).

The remaining arguments are unavailing at this juncture. The government represents that because "it would look poorly if Co-Schemer E received finder's fees related to TRS investments because of his close relationship with Levine . . . Levine, Co-Schemer C, and Co-Schemer E initially discussed an arrangement where the finder's fees would be treated differently depending on which state pension fund made the investment." (R. 314-1, Gov't Reply at 21.) If the fee resulted from a TRS investment, they would direct the fee to an LLC wholly owned by Co-Schemer C, and if the fee derived from elsewhere, they would direct it to an LLC owned by Co-Schemer C and Co-Schemer E equally. (*Id.*) The government submits that a recorded telephone call corroborates this money-sharing arrangement. Because of the corroborative evidence, and the inference arising from the planned method of directing the fees to two different entities, the Court concludes that the government has met its burden of establishing that these purported transactions are part of the charged conspiracy.

E. Investment Firms 4 and 10

The government asserts that Levine and Cari "tried to force a prospective TRS applicant, Investment Firm 4, to pay a finder's fee to a consultant, Co-Schemer F, who had done no work for Investment Firm 4." (R. 247-1, Gov't Proffer at 41.) Levine will testify that he and Rezko expected to share the money that Co-Schemer F would get from Investment Firm 4 (*id.* at 42), and that Co-Schemer E would receive a portion of Co-Schemer F's finder's fee (*id.* at 47). Levine and Rezko also tried to help Investment Firm 10 receive an investment from a different state board after Cari promised to arrange for Investment Firm 10 to pay a finder's fee to a consultant chosen by Levine. (*Id.* at 47-48.)

Regarding these firms, Defendant acknowledges that Levine, Cari, and Co-Schemer F will testify at trial and "[t]o whatever extent their statements, or those of Co-Schemer B, are offered as statements of co-schemers related to the proposed transactions with Investment Firms 4 and 10, the Defendant does not object." (R. 258-1, Def. Resp. at 39.) Defendant, however, does object to the admissibility of Co-Schemer E's statements as they relate to these Investment Firms. Defendant contends that the government has not established that Co-Schemer E was aware of any fee-sharing arrangement or Levine's directive to Loren to prepare a contract between Co-Schemer E and Co-Schemer F. As set forth by the government, Defendant's objection is unsustainable at this juncture in light of the inferences arising from a recorded phone call between Levine and Co-Schemer E about the Investment Firm 4 finder's fee. (R. 314-1, Gov't Reply at 22-23.)

F. Investment Firm 5 and Investment Firm 6

In its proffer, the government discusses Investment Firm 5 at length, but, as Defendant points out, the persons identified as relevant to that transaction – Individual G, Individual H, Individual Z, and TRS Staffer A – are not alleged to be co-schemers, thus rendering Rule 801(d)(2)(E) inapplicable to their respective statements. (R. 247-1, Gov't Proffer at 49-52; R. 258-1, Def.'s Resp. at 40; R. 314-1, Gov't Reply (tacitly conceding that it will not seek to admit statements under Rule 801(d)(2)(E) by not discussing the point).) To the extent the government seeks to admit co-schemer statements regarding this transaction, the Court will

STATEMENT

take up the issue at trial.

Regarding Investment Firm 6, Defendant does not object to the conditional admission of the statements of Co-Schemer I pursuant to Rule 801(d)(2)(E). Defendant, however, does object to the admission of Co-Schemer E's statements regarding this transaction. It is unclear from the proffer whether the government will seek to admit Co-Schemer E's statements regarding Investment Firms 5 and 6. Accordingly, the Court will address the issue at trial should it arise.

G. Investment Firm 7

The parties discuss at some length the factual background relating to Investment Firm 7. The Court will not recount those arguments in detail here. It sufficient for present purposes to note that the government has established by a preponderance of the evidence, through a series of recorded conversations, that Levine, Rezko, Co-Schemer A, Co-Schemer B, and Co-Schemer E conspired to extract a kickback from Individuals affiliated with Investment Firm 7, a firm slated to receive $220 million from TRS to manage. (R. 247-1, Gov't Proffer at 56.) To the extent Defendant objects, the Court will address during the context of the trial testimony whether any particular statement was "in furtherance" of the conspiracy.

H. Investment Firm 9

According to the government's proffer, Levine, Co-Schemer A, and Co-Schemer C also tried to help Investment Firm 9 receive TRS investment money because Co-Schemer C was going to receive a finder's fee, which he would share with Levine, if TRS invested with Investment Firm 9. (R. 247-1, Gov't Proffer at 62.) Defendant was not directly involved in this transaction. (R. 314-1, Gov't Reply at 25.) Levine discussed this plan with Co-Schemer A because Levine wanted Co-Schemer A's real estate management firm to receive the TRS money, which that firm would use to invest in Investment Firm 9 projects. (R. 247-1, Gov't Proffer 62-63.) Co-Schemer A's company received a $220 million allocation from TRS, but it had not invested that money with Investment Firm 9 by the time the FBI approached Levine, and it did not make any investment afterwards. (*Id.*) Notwithstanding Defendant's objection that the deal was not consummated and that there is no corroborative evidence that Levine would receive a personal gain, the government's proffer is sufficient to establish that this transaction was part of the charged conspiracy. Indeed, the government asserts that Co-Schemer C "will say that he fully expected to share any finder's fee he received from Investment Firm 9 with Co-Schemer E and Levine, as was their normal arrangement." (R. 314-1, Gov't Reply at 25.)

I. The Real Estate Management Company

The government submits that Levine, Rezko, and Co-Schemer B also talked about the idea of creating a real estate asset management company that they would control (but that would be owned by others) and that they would use to manage TRS real estate investments. (R. 247-1, Gov't Proffer at 64.) The government proffers a phone call where Levine discussed the proposed company with Co-Schemer E:

> I [Levine] said to Tony when I found out, I says you know these fees are great. But what the fuck is a fee. I said we should make a business out of this like [Co-Schemer A] or [Individual J] had . . . he [Rezko] said to me orchestrate the whole thing Stuart just, just, just do it let me know what I gotta do.

(*Id.*) The government submits that the two then discussed various people affiliated with either them or Rezko who might participate in the potential business, and that Levine then said, "I can with no difficulty get $500 million dollars put into this as, asset manager," to which Co-Schemer E replied, "How 'bout just directly into my bank account." (*Id.*) Levine also spoke to Loren about this idea, including that "Rezko was interested in doing business with the state pension funds but wanted to use a place holder so as not to be directly involved." (*Id.*) Although Defendant objects to the admission of these statements because both Co-Schemer

E and Loren disputed the factual possibility of creating such a company (R. 258-1, Def. Resp. at 48), the Court will admit these statements because their content alone supports that they were statements made in furtherance of the conspiracy.

J. Illinois Health Planning Board Statements

A second aspect of the charged fraud scheme involved Levine's position on the Illinois Health Planning Board, a nine-member entity established by statute and commissioned by the State of Illinois. (R. 247-1, Gov't Proffer at 64.) As required under state law, any entity seeking to build a hospital, or other medical facility, had to obtain a "Certificate of Need" ("CON") from the Planning Board before beginning construction. (*Id.* at 64-65.) In evaluating a CON application, the Planning Board members "were required to base their decision on an application . . . on a reasonable and objective application of the pertinent standards set forth in the [Illinois Health Facilities] Planning Act and the Planning Board Rules." (*Id.* at 65.) Levine was a member of the Planning Board in 2003 and 2004. (*Id.*) The government asserts that Rezko maintained *de facto* control over the Planning Board because five Board members, including Levine, would vote however Rezko wished. (*Id.* at 67.)

According to the government, Rezko and Levine sought to receive kickbacks from hospitals that needed a CON and relied on other individuals, including Kiferbaum, Hurtgen, and Loren, to aid in the scheme. (*Id.*) In May 2003, Mercy Hospital sought a CON to construct a hospital in Crystal Lake, Illinois. (*Id.* at 65.) Kiferbaum, who would receive a contract from Mercy to build the hospital, and Levine agreed that Kiferbaum would pay a kickback of at least $1 million to Levine if Levine were able to help Mercy Hospital receive its CON. (*Id.* at 67-68.) Rezko, initially opposed to Mercy Hospital's CON, eventually supported the Mercy Hospital's application, but only after Levine agreed to share Kiferbaum's kickback. (*Id.* at 68.) Levine later told Kiferbaum that he would help Mercy Hospital obtain a CON. (*Id.*) Levine and Kiferbaum agreed that Kiferbaum would pay the kickback to Co-Schemer E, pursuant to a consulting contract drafted by Loren. (*Id.*) Levine and Rezko discussed Kiferbaum's kickback at the April 14 Standard Club meeting. (*Id.* at 68-69.)

The government proffers that Levine, Hurtgen, and Kiferbaum also tried to effectuate a kickback from Edward Hospital. (*Id.* at 73-75.) After first receiving an "intent-to-deny" from the Planning Board, Edward Hospital representatives met with Hurtgen. (*Id.* at 73.) Hurtgen had spoken to Levine, who confirmed that Edward Hospital's chances of getting a CON "would be better if they hired Kiferbaum to build it." (*Id.*) From December 2003 through April 2004, Kiferbaum and Hurtgen met with Edward Hospital representatives several times. (*Id.*) According to the proffer, the "Edward Hospital representatives constantly pressed Kiferbaum and Hurtgen for assurances that hiring Kiferbaum would ensure that Edward Hospital would receive its CONs." (*Id.* at 74.) "In the course of those discussions, Hurtgen and Kiferbaum each indicated that Rezko and Levine controlled five votes on the Planning Board. Hurtgen and Kiferbaum also indicated to the Edward Hospital representatives that they would not receive their CONs if they did not hire Kiferbaum." (*Id.*) Ultimately, Edward Hospital did not hire Kiferbaum, and it did not receive a CON. (*Id.* at 74-75.) Levine subsequently discussed Edward Hospital's failure to get a CON with Kiferbaum, Loren, and Co-Schemer E. (*Id.* at 75.)

Defendant's main objections to the admission of these statements are that Rezko did not know about the kickbacks, that he did not in fact control how the Planning Board would vote, and that it was Mercy Hospital's widespread lobbying, not Kiferbaum's bribe, that resulted in the CON's approval. What remains unchallenged, however, is that Levine will testify that he and Rezko discussed how to split up the kickbacks related to Levine's position on the Planning Board. Statements regarding the co-schemer's efforts in that regard are admissible under Rule 801(d)(2)(E), even if Rezko was unaware of the scheme until the April 14 Standard Club meeting because a member of a conspiracy does not have to know all of the details of the

STATEMENT

conspiracy. Accordingly, the statements that the government has specifically identified in its proffer (including those relating to "other hospitals" (*see* R. 247-1, Gov't Proffer at 75)) are admissible against Defendant.

CONCLUSION

The government's proffer has established by a preponderance of the evidence the a conspiracy existed, and that Defendant participated in that conspiracy. But while the government has established that certain categories of statements satisfy the first two elements of Rule 801(d)(2)(E), Defendant aptly points out that the ultimate determination of whether many of the particular statements are "in furtherance" of the conspiracy must wait until trial, when their specific substance becomes known. (*See* R. 258-1, Def.'s Resp. at 6 ("absent from the government's proffer is any attempt to explain how any particular proffered statement furthered the alleged scheme").) Aside from the specific statements admitted as noted above, the Court will address the additional statements at trial to the extent Defendant objects to their admissibility.